

Mine and Your's

Maximilian Steinbeis

2019-05-04T16:37:01

Kevin Kühnert is the name of a young fellow from Berlin who is the talk of Germany in these days: the president of the "Young Socialists", the Social Democratic Party's youth organisation, had already risen to considerable prominence last year as a vocal and effective opponent of a renewed "GroKo" coalition under Angela Merkel. Now, Kühnert has once again caused a huge rumpus when he shared some of his social and economic policy views in a newspaper interview, right on the International Workers' Day, and will you believe it? Turns out he is a... socialist! He likes the idea of collectivizing big corporations and putting an end to real-estate speculation. He believes that it might even make sense to not let private investors rent out real-estate property to others for profit at all any more. These are the views of chief *Jungsozialist* Kevin Kühnert, and half of Germany acts as if the dead eyes of the spectre of communism had looked them in their ashen faces. The FDP is calling on the Social Democrats to clarify their "relationship to property", the CSU demands from its coalition partner hard evidence that they "do not think in a socialist way", and the far-right AfD is horrified to a point where they call for the Federal Office for the Protection of the Constitution to take action against young Kevin and his hammer-and-sickle-wielding ilk, which is all the more ironic as the AfD is itself in a bit of a pickle right now in terms of *Verfassungsschutz* surveillance.

The question of the economical and socio-political wisdom of Kühnert's proposals aside, what I find interesting about the whole matter is the implication, apparently taken for granted by surprisingly many, that socialism is something that is somehow per se unconstitutional. As if the idea of encroaching upon private property rights were a complete no-no for any party that wants to be perceived as anchored in solid constitutional ground.

The right to property, according to Article 14(1) of the *Grundgesetz*, is guaranteed in Germany: What is mine, what I own to be for myself and provide for my livelihood and privacy and depend on no one else, cannot be taken away from me just like that simply because someone more powerful finds that what is mine should better be his. This is also and especially true for the state – but with an emphasis on *just like that*. In fact, the state can do almost anything with my property, even take it away from me – but not *just like that*. It may regulate the use of my property almost to the point of its complete uselessness – but only for the benefit of the public and in adequate proportion to my loss. It may also expropriate me and downright kick me out of my house – but only by or on the basis of a properly enacted law and in return for an appropriate compensation. What the state is not allowed to do is to simply walk over me as if I weren't even there. As long as it doesn't and I, as a private person, am adequately present in its calculation, there is actually rather little it can't legally do with my property under the current German constitution.

The *Grundgesetz* is not a libertarian constitution

The German constitution and its catalogue of fundamental rights are not primarily intended to keep the state at distance for the maximum free enjoyment of my property. It is by no means interested in maximizing my possibilities to pretend that I am all alone in the world at 200 km/h on the *Autobahn*, as some self-proclaimed "liberal" German party leaders and newspaper editors may like to believe. Sorry, but no. Not the case.

The official archive of the Federal Constitutional Court is full of judgments in which private owners have been told that unfortunately they have to put up with the restriction of their freedom in the use of their property by this or that law for the common good. Back in the 1990s, Paul Kirchhof had tried for some time to turn the jurisdiction of the Court in a more libertarian direction and persuaded the Second Senate to declare a number of tax laws unconstitutional, most prominently property tax. Ernst-Wolfgang Böckenförde, who was Kirchhof's colleague on the bench of the Second Senate at the time, pinned down in a scathing dissenting opinion what was wrong about that approach which at any rate was given up by the Court soon after Kirchhof left the bench in 1999.

++++++A Note by EURAC++++++

*Do you work in a field related to **comparative federalism, regionalism or intergovernmental relations**? Are you interested in multi-level government? Win a three-week research stay at [Eurac Research](#) in Bolzano/Bozen (South Tyrol) in the heart of the Alps. Hand in a paper (yet to be published or currently under review) on comparative federalism, regionalism or intergovernmental relations in English, German, Italian, French or Spanish by **1 July 2019**. Details [here](#).*

++++++Paid Advertisement++++++

Libertarianism and constitutionalism don't sit well together in general, at least as far as the *Grundgesetz* is concerned. A constitution, to quote Niklas Luhmann, is a structural coupling of law and politics – it forces political power under the rule of law, but at the same time it opens up the law to political processing. It makes the law negotiable and changeable by the will of political majorities. That is why it is not a flaw or weakness of the *Grundgesetz* that it doesn't guarantee property as a precisely shaped right but leaves its shape, content and limits to the legislature to determine. It's not a bug, it's a feature: What I am allowed to do with what is mine and what I'm not, should remain a matter of politics, negotiable and changeable by whoever wins the election and gains a majority. It should not be constitutionally enshrined and thereby withdrawn from the process of ordinary majoritarian politics. In that sense, the *Grundgesetz* encourages Kevin Kühnert to seek the necessary majorities for the socialisation of BMW and restrictive legislation on the private letting of residential property, and to deal with the concerns of those affected in a proportionate and appropriate manner. If he succeeds one day? Well, then the *Grundgesetz* is in principle just fine with that.

One could even say that this is one of the decisive reasons why we celebrate the success and achievements of the *Grundgesetz* on its 70th anniversary in these days: It has managed to keep the conflict between labour and capital open for political processing instead of closing it by means of higher-ranking constitutional law. It has made it possible for socialists to exert state power and shape the law (provided they don't use it to proclaim the dictatorship of the proletariat), thus turning the big political cleavage of the 20th century into a matter of politics, as opposed to a matter of the constitutional system. Under the *Grundgesetz*, we ultimately came to terms with worker participation in the 1970s just as we will come to terms with minimum wage in the present, and even if the conservative doctrine of constitutional law did not refrain from attempting to upgrade the right to property and personal contracting autonomy (*Privatautonomie*) to constitutional arguments of closure, as far a legal practice was concerned most of these attempts were ultimately unsuccessful.

To get back to Kühnert and his socialism: what I also find remarkable about his ideas is how conservative they actually look from a certain angle. If property is the protected space of the private individual in which I can be for myself unchallenged by the impositions and demands of public life – then his idea of a rented space in which I live my life unchallenged by real estate markets and financial bubbles appears not that far away, does it? The good old liberal constitutionalists who demanded and enforced their right to peaceful enjoyment of their wealth and property against feudal privileges and military requisitions and the absolutist monarch's sovereign will back in their day: they could possibly sympathise with Kühnert's position a lot more easily than with the platform economy and investment madness which today's libertarians strive to set as the summit of private autonomy, I should think.

"Unity of society" instead of protection of minorities

This week, the **European** Court of Justice has published its opinion on the CETA investment protection agreement with Canada. [MARKUS KRAJEWSKI](#) interprets the result as a sign that the ECJ "wants to act as a great friend and helper in the European Commission's efforts to reorganise dispute resolution in investment protection proceedings". [TILL PATRIK HOLTERHUS](#) is concerned that the ECJ will cover the EU's external policy with a network of new standards that could considerably restrict its room for manoeuvre under modern international law.

Between the ECJ and the **German** Federal Constitutional Court, many see a new conflict emerging on the horizon – on the subject of ecclesiastical labour law. [HEIKO SAUER](#) cools down the passion of the debate with some level-headed arguments and observations and points out that the Federal Constitutional Court would first have to declare the Church's complaint against the ECJ-prescribed obligation to hire a non-baptised employee admissible if it wanted to confront the Luxembourg Court – which, at any rate, is not exactly self-evident.

As already mentioned in my last editorial, the **European** Court of Human Rights had held a hearing on the epochally important question of refugees' access to visas as a requirement of human rights protection. [DANA SCHMALZ](#) was present and reports

that in addition to this there is a hardly less important question at stake – the binding effect of judicial decisions.

Speaking of the judiciary: in **Hungary**, the Fidesz government is working on setting up an administrative court system composed and adjudicating according to the government's own predilections. Despite numerous procedural problems during legislation, the Constitutional Court was unable or unwilling to discover any faults in this process, which is assessed by [VIKTOR KAZAI](#) as a "massive amount of hypocrisy".

In **Slovakia**, the Constitutional Court declined a motion to ban the party of right-wing extremist leader Marian Kotleba. [MICHAL OVÁDEK](#) reports what this is all about.

In **Latvia**, the Constitutional Court has changed its case law on the protection of minorities and subordinated the rights of minorities to the goal of preserving the "unity of society" – an extraordinarily disturbing precedent, according to [ALEKSEJS DIMITROVS](#).

After the elections in **Spain**, the trend towards fragmentation of the parliaments has been confirmed once again. The fact that this makes it increasingly difficult to form a government is not an unchangeable fate, however, as [STEFFEN GANGHOF](#) proves with an innovative proposal.

In **Turkey**, 14 journalists from the venerable daily newspapers *Cumhuriyet* have received prison sentences, some of them for many years. [BERTIL ODER](#), dean of the Koç University law faculty in Istanbul and daughter of the columnist and co-defendant Hikmet Çetinkaya, reports on the trial and the silence of the Turkish Constitutional Court and the European Court of Human Rights.

Elsewhere

[KANSTANTSIN DZEHTSIAROU](#) deplores, on the occasion of the case of **Ukraine**, the practices of electing judges to the ECtHR in some Member States.

[ANNA NADIBAIDZE](#) is displeased by the fact that the **Western Balkans** play no role at all in the European election campaigns.

[JENS HILLEBRAND POHL](#) reminds us that in seven months' time the Appellate Body of the **WTO** will be down to one member and thereby dysfunctional, due to the US blockade, leaving the entire body of WTO law in want of a law enforcement mechanism.

ADAM BODNAR, the **Polish** Civil Rights Ombudsman, has been awarded the 2019 World Justice Project Prize; his speech of acceptance is documented [here](#).

[WILLIAM PARTLETT](#) asks whether Russian President Putin could find a role model for the end of his term of office in 2024 in **Kazakhstan**, of all places.

That's it for this week. All the best, and take care,

